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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 287

EARL RUSSELL BROWDER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WALTER H. POLLAK,
Counsel for Petitioner.

WALTER H. POLLAK,
CAROL KING,
BENJAMIN GOLDRING,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 287

EARL RUSSELL BROWDER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Supreme Court of the United States:

Your petitioner, Earl Russell Browder, respectfully alleges:

A.

Summary Statement of the Matter Involved.

Petitioner—a citizen of the United States—was convicted of "wilfully and knowingly using" a passport obtained by false statement. The "use" charged is the presentation of the passport to immigration inspectors upon the citizen's return to the United States in 1937 and again in 1938.

Petitioner was sentenced to four years in jail—two years on each of two counts—and fined $2,000. He is now on bail.

1m

Petitioner was convicted after trial in the New York Southern District Court before Judge Coxe and a jury. The Second Circuit Court of Appeals affirmed the conviction June 24, 1940. The mandate was stayed June 28, 1940.

Judge Patterson's opinion notes the novelty and difficulty of the issue.

B.

Jurisdiction.

Petitioner was convicted of violating Section 2 of Title IX of the Act of June 15, 1917 (22 U. S. C. §220). This Court's jurisdiction rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. §347).

C.

Questions Presented and Reasons Relied on for the Allowance of the Writ.

1. The statute punishes passport "use". Many considerations—the context; the historic quality of a passport; the evil sought to be remedied—establish that the use is use in foreign travel. It is not a casual employment of the document by a citizen—in this instance a native citizen—to establish his right to return. The result in the courts below violates the settled rule of the construction of penal statutes. (*Apex Hosiery Co.* v. *Leader*), 84 L. Ed. [Adv.] 913).

2. The courts below construed "wilfully and knowingly" in conflict with flat authority in this Court. (*U. S.* v. *Murdock*, 290 U. S. 389, collecting authorities; *U. S.* v. *Illinois Central R. Co.*, 303 U. S. 239, 242-3). Against a motion to dismiss they permitted and upheld a finding of "wilfulness" despite the total absence of evidence of improper purpose.

WHEREFORE your Petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding said court to certify and send to this Court a complete transcript of the record and all proceedings had in said Circuit Court of Appeals for the Second Circuit in the case there entitled United States of America, plaintiff-respondent, against Earl Russell Browder, defendant-appellant; and that said case may be reviewed and determined by this Court and the decision therein finally reversed; and that your petitioner may have such other or further relief or remedy in the premises as to this Honorable Court may seem appropriate.

Respectfully submitted,

EARL RUSSELL BROWDER,
By WALTER H. POLLAK,
Attorney.

Dated July 26, 1940.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 287

EARL RUSSELL BROWDER,

Petitioner,

against

THE UNITED STATES OF AMERICA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion has not yet been reported. It appears at R. 399-403.

II.

Jurisdiction.

1.

The statutory provision is Jud. Code, § 240(a) (28 U. S. C. § 347) as amended by the Act of February 13, 1925, 43 Stat. 938.

2.

The date of the order for mandate was June 28, 1940 (R. 403).

III.

Abstract of Case.

Browder was convicted of violating § 2 of Title IX of the Act of June 15, 1917 (§ 220 of Title 22, entitled Foreign Relations and Intercourse—of the U. S. Code).

> "* * * *Use of passport obtained by false statement; penalty* * * * whoever shall willfully and knowingly use or attempt to use * * * any passport the issue of which was secured in any way be reason of any false statement, shall be fined not more than $2,000 or imprisoned not more than five years or both." *

The indictment is in two counts (R. 2-5):

The *first* count charges that on April 30, 1937, Browder, within the Southern District of New York, wilfully and knowingly used and attempted to use a passport issued September 1, 1934, in his name, by presenting it to an immigration inspector. Browder had obtained this passport "by reason of a false statement made in the application therefor." In reply to a statement in the application blank—" 'my last passport was obtained from' "—he inserted " 'none.' "

The *second* count charges a like misuse of the same passport on a different day, February 15, 1938.**

The government proved that Browder made the insertion in his passport application; that he had had other passports in other names; that when he returned to the United States on April 30, 1937, and February 15, 1938, he showed

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* For Title IX in its full form, see Appendix pp. 2-4.

** The passport Browder is charged with misusing was on each occasion a renewed passport (indictment, R. 2, 4). The original passport was issued September 1, 1934 (R. 2, 4). By its terms (R. 316)—pursuant to 22 U. S. C. §217a (Appendix p. 16)—it expired at the end of two years, September 1, 1936. It could be renewed for another two years (Appendix p. 16). February 2, 1937, it was (R. 2, 4).

the passport to immigration inspectors who passed him as a returning citizen (R. 119, 125).

Browder was born in Wichita. "He is and always has been a native citizen of the United States" (stipulation, R. 347).

Browder moved to dismiss the indictment at the opening of the case (R. 15) and again after the evidence was in (R. 226-9, 235). Both motions were denied (R. 25, 33, 36, 227, 228, 229, 235), exception taken to both denials (R. 33, 35, 36, 230, 235, 236), and error assigned upon such denials (R. 382-3, 385, 386, 388). The denial of these motions was error which, we shall demonstrate, this Court should review:

(I) There was no use.

(II) There was no wilfulness.

I.

THERE WAS NO "USE"

A citizen of the United States returns to the United States. His right to enter is unqualified. The immigration service cannot hinder him. Once the service learns of his citizenship its concern with the citizen is at an end (R. 122, 128). There are many ways in which citizenship may be established. One of them is to show an American passport. The citizen does show it to an immigration inspector. The courts below hold this casual employment of a passport to be—within the meaning of a penal statute—a "use." *

The holding contradicts administrative practice under cognate Sections; overlooks the intrinsic quality of a passport; ignores the evil the statute was designed to remedy; disregards the historical facts that not until 1918 did Congress adopt any control over "entry" by citizens and that in 1921 Congress allowed that control to expire.

Sections 2, 3 and 4 are cognate. The showing of a passport to an immigration inspector is manifestly not a "use" within Sections 3 and 4, and cannot be a use under Section 2.

Sections 2, 3 and 4 of Title IX—respectively 22 U. S. C. §§ 220, 221, 222—are cognate:

Section 2 punishes "use" of a passport obtained by false statement.

Section 3 punishes "use" of a passport in violation of the conditions, restrictions, and rules the passport contains.

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* The basic rulings were the rulings denying the motions to dismiss at the opening and at the close of the case. Consistently with these rulings Judge Coxe refused numerous requests to charge. Among others he refused a request which called attention to the "inherent nature of a passport" as "used in foreign countries" and which declared

> "that a passport has no sanctioned use, in law or custom, insofar as an American citizen is concerned, within the Port of New York" (33d request included in Thirty-first assignment, R. 392, for exception see R. 300).

Section 4 punishes "use" of a passport "which has become void by the occurrence of any condition therein prescribed invalidating the same."

Administrative practice certifies that a citizen's showing of his passport to an immigration inspector is not a use within the meaning of §3 or §4:

> The "use" of an expired passport is pretty clearly a crime under §3; it is a "violation of the conditions or restrictions therein [in the passport] contained, or of the rules prescribed pursuant to the laws regulating the issuance of passports, which said rules shall be printed on the passport" (see the abstracts from passport regulations appearing in Browder's passport, Gov. Ex. 5, R. 330). The "use" of an expired passport is certainly a crime under §4; such a passport "has become void". (Circular instruction of March 26, 1923, Appendix p. 21).

Now it is clear that a citizen who—in order to establish his citizenship—upon returning to the United States shows an expired passport to an immigration inspector has not "used" the passport; has not violated §3 or §4; has not committed any offense of any kind. The thing is done all the time. American citizens returning from Canada, say, or Bermuda, present expired passports to show that the *are* citizens.

And not only citizens returning from short trips to neighboring lands employ expired passports to establish their citizenship. The New York *Times* of July 19, 1940, describing the arrival of the *Manhattan* from Lisbon in New York Harbor, says (p. 10, col. 1)

> "The American passengers were predominantly long-time residents of Europe, and immigration men said that faded and outdated passports, some as old as twenty and thirty years, were turned in at the immigration tables where passengers were gathered."

The immigration service does not prosecute these returning Americans who have travelled in this hemisphere or have long lived in the other. It does not condemn the practice of presenting expired passports. On the contrary it recognizes the practice as a convenient mechanical means of establishing what the service wants to know,— that the persons who present these passports are citizens and that the service therefore has no concern with them.

The court below rejects the consideration of this practice. Its point (R. 403) is that there is no formal proof of the practice. There is no need of formal proof. Courts judicially notice long-established and widespread custom. Particularly they notice established administrative practice.*

Sections 3 and 4 confirm that "use" is concerned with employment of a passport to attain ends that cannot be attained otherwise than by the passport. "Use" is addressed to employment of the passport not upon a citizen's return to this country but in connection with travel abroad. These things are clear upon their face and from their context. They are more clear when it is remembered that the penalty—if even the fine is disregarded—is 5 years in prison. It cannot be that Congress intended to impose such a penalty upon the employment by a citizen of a passport—defective in some respect not concerned with citizenship—to prove the true fact of citizenship.

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* The practice under consideration was assumed as familiar by Mr. Flournoy, division chief of the Department of State, testifying at a hearing before the House Committee on Foreign Affairs (66:1 House Com. on Foreign Affairs, Extension of Passport Control, Hearings on H. J. Res. 205 and H. R. 9782, Oct. 1919, p. 33):

He referred to Americans "who have been living in alien countries for many years" and who "arrive at the ports with old passports".

• • • • • • •

A passport's function is in connection with travel abroad.

"The issuing of passports is a convenient system adopted by States to secure for their citizens a right of transit through *foreign* countries" (Borchard, *Diplomatic Protection of Citizens Abroad,* N. Y. [1916], p. 493, our ital.). A passport "is a document, which, from its nature and object, is addressed to *foreign* powers" (*Urtetiqui* v. *D'Arcy,* 9 Pet. 692, 699, our ital.). A passport "certifies that the person therein described is a citizen of the United States and requests for him while *abroad* permission to come and go as well as lawful aid and protection" (Borchard, *supra,* our ital.). A passport "is intended *only* for use *abroad,* and has no sanctioned uses, customary or statutory, within the United States in time of peace" (Dep't of State, *The American Passport* [Gaillard Hunt, ed., 1898], p. 4, our ital.).*

The court below found the statement by Mr. Gaillard Hunt too "sweeping" (R. 401). "A use that is long established and takes place commonly within the United States is the presentation of a passport to foreign consulates here for procurement of visa, in anticipation of travel abroad." This is true. And the court's own citation of Mr. Hunt's work shows that Mr. Hunt did not overlook the fact. But this use while not literally "abroad" is on the court's own correct statement for the purpose "of travel abroad." It is not employment by a citizen returning to the land of his citizenship.**

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* Defendant requested a charge in essence verbally identical; the court refused it; defendant excepted; defendant assigned the ruling as error (R. 283, 300, 389).

** The statement by Mr. Hunt, that we quoted and that the court criticized, may be regarded as literally correct. "For many purposes" a foreign consulate is part of the territory of the country the consul represents (14 Op. Atty. Gen. 281, 285 [1873]; 2 Moore Int. Law Digest 266).

"Passports issued by the Department of State or its diplomatic or consular representatives are intended for identification and protection in foreign countries, and not to facilitate entry into the United States. * * *." So it was written in the executive regulations promulgated January 24, 1917, and in effect June 15, 1917, when § 2 was enacted. So, before that date, it had been declared in one set of executive regulations after another.*

The 1917 executive regulations did more than establish that passports were not "to facilitate entry into the United States." They explained why: the sentence we quoted adds the words "immigration being under the supervision of the Department of Labor." **

The court below leaves it unchallenged that in 1917 "use" meant utilization in connection with travel abroad. It "assumes that in 1917 the use of a passport to prove citizenship on entry into this country had not become customary" (R. 402). It finds the "decisive" "fact" that such a use—use on return to this country—was a recognized and sanctioned use when the acts charged in the indictment occurred. The court cites *Maxwell on Interpretation of Statutes* (6th ed., pp. 144-5), *De Lima* v. *Bidwell*, 182 U. S.

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* Presidential passport rules of: June 7, 1911, rule 4, par. 3; Nov. 13, 1914, rule 4, par. 3; Jan. 12, 1915, rule 5, par. 3; Dec. 17, 1915, rule 6, par. 2; April 17, 1916, rule 6, par. 2; Jan. 24, 1917, rule 6, par. 2.

** Department of State rules (Appendix p. 20), promulgated June 1, 1915, governed the granting and issuing of passports to aliens who had declared their intention of becoming citizens (pursuant to § 1 of the Act of March 2, 1907, repealed by § 5 of the Act of June 4, 1920 [Appendix pp. 1, 12]). In accord with the principle applicable to passports generally the Secretary declares:

> "A passport may be granted to a declarant under the statutory provision quoted above for purposes of identification, and protection in foreign countries, other than his country of origin, but not for the purpose of facilitating reentry into this country. All matters relating to immigration being under the supervision of the Department of Labor, any inquiries concerning the right to reenter the United States should be addressed to that Department" (Appendix p. 20, see also p. 19).

1, *Puerto Rico* v. *Shell*, 302 U. S. 253. Mr. Maxwell declares

> "the language of a statute is generally extended to new things which were not known and could not have been contemplated by the legislature when it was passed. This occurs when the Act deals with a genus, and the thing which afterwards comes into existence is a species of it."

The *De Lima* and the *Puerto Rico* cases decide that statutory references to "territories" came to include Puerto Rico when Puerto Rico became a territory. The principle is beyond debate, at least where the statute is civil. But the principle can have no application. In 1937 or 1938 there was no recognition—legislative or executive—of passport presentation to an immigration inspector as "use." There was no requirement that any citizen returning to this country employ a passport for the purpose, or have a passport. All that happened was that, beginning in 1930, the Department of State in its Notice to Bearers of Passports "*advised*" the citizen to carry a passport except in travel to Canada and Mexico. The citizen was informed that the having of a passport might "save the time and inconvenience of applying for one abroad should the holder desire to travel in countries where passports are required." The citizen was further "*advised*"—and this is the point of the court's quotation (R. 401)—that the passport "will also enable the holder to establish his American citizenship upon his return to the United States and thus facilitate his entry." The State Department on numerous occasions did give this perfectly correct advice.

But the advice did not found a "use." The practice of employing documents whose "use" as passports was forbidden was unaffected. Citizens went right on presenting

expired passports—the "use" of which the statute made criminal—for the purpose of showing their citizenship. This was the practice—the "custom"—that the immigration service in 1937 and 1938 continued to "sanction and recognize."*

The problem is of the meaning of "use" in a passport statute enacted in 1917 and alleged to have been violated two decades later:

In 1917 there was no requirement that a citizen entering the United States have a passport.** In 1934 when Browder obtained his original passport there was no such requirement. In 1937 when he obtained his renewal—and when he made the first presentation to an immigration inspector—there was none. In 1938 when he made the second presentation there was none.

In 1917 there was no requirement even that an *alien* entering this country have a passport from any country. What Judge John Bassett Moore wrote (3 Dig. of Int. Law, p. 858) in 1906 remained true in 1917:

> "There is neither law nor regulation in the United States requiring those who resort to its territories to produce passports."

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* It appears that rules promulgated by the Department of State, March 31, 1938—less than a year after the first alleged offense, about a month after the second—illustrate the Department's instinctive recognition that passport use was use abroad. Rule 125 of that date (3 F. R. 681, Appendix p. 18) reads:

> "Should a person to whom a passport has been issued knowingly *use* or attempt to *use* it in violation of the conditions or restrictions contained therein or of the provisions of these rules, the protection of the United States may be withdrawn from him while he continues to reside *abroad.*"

** As appears *infra* p. 17 such a requirement was imposed in 1918 and done away with in 1921.

The evil Title IX was designed to remedy was the misuse of American passports abroad.

The evil existing in 1917—the evil Title IX was designed to remedy—was the misuse of American passports abroad.* Title IX was enacted two months after the United States went to war.** It was the product, however, not of our belligerency but of our neutrality. As Senator Overman, who had charge of the bill that included Title IX, explained,—"most of the bill was framed before the [American participation in] war and it only affected neurtality" (65 Cong. Rec. 1st sess., p. 3439, June 11, 1917; see also Annual Report of Atty. Gen. 1917, p. 73).

During our period of neutrality passport abuses were flagrant and notorious. German and Austrian army officers and reservists obtained American passports in order to return to Germany and Austria. Agents of the Central powers obtained American passports in order to enter Allied countries. With these false passports these aliens passed through the Allied fleets and returned to their own countries to fight, or entered the Allied countries to spy. Writing of activities of "German and Austrian officials in the United States * * * in violation of the laws of this country and contrary to the usage and practice of officials and individuals of belligerent nationality while residing in the territory of a neutral nation and enjoying its hospitality," Secretary Lansing says (War Memoirs of Robert Lansing [1935] p. 73):

> "Chief among these acts was the improper use of passports issued by the United States and by other neutral countries to secure the safe passage of Germans through the enemy's lines of blockade to ports in

* The Supplement describes the system of passport control during our period of neutrality, and shows that it was concerned with outgoing travellers only.

** Title IX came to be part of a consolidated measure affecting various aspects of our foreign relations.

> neutral territory adjacent to Germany, which was their ultimate destination."

It was because of their involvement in passport frauds that the German diplomatic officials—Captain von Papen and Captain Boy-Ed—were sent home (*ibid.* pp. 74, 79).

Aliens, without right, obtained American passports in several ways—transfer from American citizens who sided with the Central powers; purchase; forgery; theft; lying to the State Department.* Writing of the "passport mill," and the activity of "perjurers and forgers," Mr. Lansing says (p. 74) "three methods were resorted to":

> "making of false affidavits and oaths as to birth and nationality, with which to obtain genuine passports; the purchase of passports duly issued to American citizens; and the forging of passports and other documents together with the reproduction of official seals, watermarked paper, engraved insignia and other evidences of genuineness."

It was not only foreigners that misused American passports. Americans—in the interest of the Central powers—did so too. Misuse by Americans too was misuse abroad. The incident of the American war correspondent, Archibald, carrying messages to the Central powers for Doctor Dumba, the Austro-Hungarian Ambassador, remains fa-

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* The contemporaneous official source material includes: letter of Jan. 20, 1915 from Secretary of State Bryan to the Chairman of the Senate Committee on Foreign Relations, in European War, No. 2, Oct. 21, 1915, pt. VI, at p. 61, and in For. Rels., 1914 Supp., at p. xii; same charge repeated in letter of Aug. 18, 1916 from State Dep't Counselor (Frank L. Polk) to Rep. John J. Fitzgerald, in For. Rels., 1916 Supp., at p. 8; Annual Reports of Atty. Gen. 1915, p. 44, 1916, p. 54, 1917, pp. 52-53; see also N. Y. Times Indices for the period in question.

Semiofficial literature includes: War Memoirs of Robert Lansing (1935), pp. 63 *et seq.*, 73-5, 79-80; U. S. Committee on Public Information, German plots and intrigues in the U. S. during the period of our neutrality, Red, white and blue series, No. 10, July 1918, at pp. 35-38.

mous. The incident culminated in Secretary Lansing's saying to Doctor Dumba (*War Memoirs*, p. 65):

> "'And now, Mr. Ambassador, please answer this question: Do you think it proper for a diplomatic representative of a belligerent government in the United States to employ an American citizen traveling under the protection of an American passport as a messenger to carry official dispatches through the lines of the enemy?'"

The control Title IX—and Section 2 particularly—set up, was a control appropriate to the evil the title and section were designed to overcome. It was not a control over returning Americans. It was not even a control over entering aliens. It was a control over persons leaving America for the warring countries of Europe.*

In 1918 Congress imposed—and in 1921 Congress allowed to expire—the requirement that a citizen have a passport in order to "enter the United States."

The clear historical record from the fall of 1914 up to and through June 1917 thus is that the legislation enacted in that month was concerned solely with travel abroad, not with entry. Consider now the historical record *after* June 1917:

With the Act of June on the books—the Attorney-General ruled that the President and executive departments had no power to curb the entry into the United States of citizens or even of—non-enemy—aliens.** At the end of 1917 the Attorney-General in his annual report and the

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* The court below does not dispute this (R. 402).

** See 65:2 H. Rep. 485 on H. R. 10264, Apr. 12, 1918, p. 2, serial No. 7307.

President in a message urged Congress to enact legislati controlling entry in war-time. In *1918* Congress passed law establishing war-time control of entry by citizens a aliens (22 U. S. C. §§ 223-226).*

Section 224 made it

> "unlawful for any citizen of the United States to d part from or *enter* or attempt to depart from or *ent* the United States unless he bears a valid passport."

Section 223c made it unlawful for any alien

> "knowingly to make any false statement in an appl cation for permission to depart from or *enter* t United States with intent to induce or secure the gra ing of such permission * * *"

The Act of *1918* was a war statute. It emphasized i war character by imposing penalties running up to twen years (22 U. S. C. § 225, Appendix p. 7). As a war statu it expired in 1921.

The Secretary of State had, before the expiration, r quested Congress to continue the provisions regulating pas port use upon entry. Congress did continue to demand th production of passports by *aliens* entering the Unite States. It allowed the Act of 1918 to lapse in its relatio to *citizens*. The Act of March, 2, *1921* (22 U. S. C. § 22 Appendix p. 13) enacts:

> "The provisions of the Act approved May 22, 191 shall, in so far as they relate to requiring passpor and visés from *aliens* seeking to come to the Unite States, continue in force and effect until otherwis provided by law."

For two decades—since 1921—there has been no law "r lating to requiring passports" from *citizens* returning t

* The sections appear in the Appendix pp. 5-7.

the United States. There has been no law regulating the entry of *citizens.*[*]

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[*] An additional illustration of the deliberateness of Congress' refusal to impose upon citizens a requirement of passport production upon their return to the United States is supplied by still another act of November 10, 1919 (Appendix pp. 8-10):

In contemplation of the expiration of the Act of 1918 by virtue of the approaching formal conclusion of peace, the Secretary of State in 1919 made the request, mentioned in the text, for the continuation in peace time of control over entry by both citizens and aliens. But Congress rejected the Secretary's recommendation in its relation to citizens; instead, it adopted the Act of November 10, 1919 providing that, if the President so proclaimed, such control should continue, solely with respect to aliens, upon expiration of the Act of 1918 and until March 4, 1921.

The 1918 Act, before its expiration, was, as we have noted, extended with respect to aliens by the Act of March 2, 1921. The 1919 Act thus never became operative.

See generally, as to these matters, 66:1 House Comm. on Foreign Affairs, Extension of Passport Control, Hearings on H. J. Res. 205 and H. R. 9782, Oct. 1919, 66:1 Cong. Rec., p. 6971; 66:1 H. Rep. 382, serial No. 7593.

II.

THERE WAS NO "WILFULNESS"

In 1934 Browder applies for a passport. He fills in a blank with a word that the jury finds false. The falsity has nothing to do with citizenship: the statement in the passport application, "I solemnly swear that I was born at Wichita, Kansas" (Gov. Ex. 2, R. 305), is exactly—admittedly—correct (Gov. Ex. 17, Stipulation, R. 347, quoted *supra* p. 7). In 1936 the passport expires. In 1937 Browder applies for renewal. Renewal is granted.

In 1937 and in 1938, Browder, as a handy way of showing his citizenship, presents his passport. Assuming the presentation is a "use", these presentations cannot be "wilful":

Wilfulness requires "wrongful intent" (*Spurr* v. *United States*, 174 U. S. 728, 735), "bad intent" (*Felton* v. *United States*, 96 U. S. 699, 702), "evil design" (*Evans* v. *United States*, 153 U. S. 584, 594), "bad faith or evil intent" (*United States* v. *Murdock*, 290 U. S. 389, 398), "a purpose to evade the laws" (*Felton* v. *United States*, 96 U. S. at 704). Wilfulness is "absolutely inconsistent with an honest purpose" (*Evans* v. *United States*, 153 U. S. 584, 594, commenting upon *United States* v. *Britton*, 108 U. S. 193).*

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* The cases cited define wilfulness "when used in a criminal statute" (*United States* v. *Murdock*, 290 U. S. at 394), including a penal statute (*Felton* v. *United States; St. Louis & S. F. R. Co.* v. *United States*, 169 Fed. 69 [C. C. A. 8, Van Devanter, Cir. J.]). When used in a statute concerned with malum prohibitum merely, the word "wilfully" may mean no more, or not much more, than "intentionally" or "deliberately." As to this distinction see *United States* v. *Atlantic Coast Line R. Co.*, 173 Fed. 764, 767 (C. C. A. 4), analyzing authorities including *Armour Packing Co.* v. *United States*, 209 U. S. 56, 85; *United States* v. *Illinois Central R. Co.*, 303 U. S. 239, 242-3; *People* v. *Jewell*, 138 Mich. 620, cited in *United States* v. *Murdock*, 290 U. S. at 394.

United States v. *Murdock* is the unanswerable authority:

The relevant statute required wilfulness only—not wilfulness and knowledge; it was less stringent than the statute at bar (see *infra*, p. 21). The statute in the *Murdock* case proscribed the crime of "wilfully failing to * * * supply * * * information" demanded of a taxpaper (392).* Murdock "refused to disclose the name of the payee" of "sums deducted by him" (393).**

"The respondent offered no evidence" (290 U. S. at 393). The trial court told the jury of his belief " 'that the Government has sustained the burden cast upon it by the law and has proved that this defendant is guilty in manner and form as charged beyond a reasonable doubt' " (393). The court furthermore denied (393) a requested charge: "'If you believe that the reasons stated by the defendant in his refusal to answer questions were given in good faith and based upon his actual belief, you should consider that in determining whether or not his refusal to answer the questions was wilful.' "

At this Court saw (290 U. S. 394), the conviction could not be supported "unless the word 'willfully', used in the sections upon which the indictment was founded, means no

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* At 290 U. S. 392 this court—italicizing the crucial word—quotes the statute under which Murdock was prosecuted:

> "'Any person required under this Act to pay any tax, or required by law or regulations made under authority thereof to make a return, keep any records, or supply any information, for the purposes of the computation, assessment, or collection of any tax imposed by this Act, who *willfully* fails to pay such tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than one year, or both, together with the costs of prosecution.' "

** Murdock's refusal was upon the advice of counsel and upon the ground that the answers would tend to incriminate, "having particularly in mind a State law" (Murdock record on appeal to this Court, p. 37).

more than voluntarily." And in a criminal statute, the word does mean "more than 'voluntarily' " (394-5):

> "The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental. But when used in a criminal statute it generally means an act done with a bad purpose;[1] without justifiable excuse;[2] stubbornly, obstinately, perversely.[3] The word is also employed to characterize a thing done without ground for believing it is lawful,[4] or conduct marked by careless disregard whether or not one has the right so to act.[5] ".

The error of the trial judge in *Murdock's* case was the same error into which Judge Coxe fell in the case at bar. "You will observe," the judge told the Murdock jury (Murdock rec. 48),

> "that the offense charged here is the willful failure or refusal to furnish information. That means, gentlemen of the jury, that having an opportunity to do so he *deliberately* designed not to furnish the information."

"The words 'wilfully and knowingly' as employed in the statute," Judge Coxe instructed the Browder jury (R. 292-293),

> "mean *deliberately* and with knowledge and not something which is merely careless or negligent or inadvertent."

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[1] Citing *Felton* v. *United States*, 96 U. S. 699; *Potter* v. *United States*, 155 U. S. 438; *Spurr* v. *United States*, 174 U. S. 728.

[2] Citing *Felton* v. *United States*, *supra*; *Williams* v. *People*, 26 Colo. 272, 57 Pac. 701; *People* v. *Jewell*, 138 Mich. 620, 101 N. W. 835; *St. Louis I. M. & S. R. Co.* v. *Batesville & W. Tel. Co.*, 80 Ark. 499, 97 S. W. 660; *Clay* v. *State*, 52 Tex. Crim. Rep. 555, 107 S. W. 1129.

[3] Citing *Wales* v. *Miner*, 89 Ind. 118, 127; *Lynch* v. *Com.*, 131 Va. 762, 109 S. E. 427; *Claus* v. *Chicago G. W. R. Co.*, 136 Iowa 7, 111 N. W. 15; *State* v. *Harwell*, 129 N. C. 550, 40 S. E. 48.

[4] Citing *Roby* v. *Newton*, 121 Ga. 679, 49 S. E. 694, 68 L. R. A. 601.

[5] Citing *United States* v. *Philadelphia & R. R. Co.* (D. C.), 223 Fed. 207, 210; *State* v. *Savre*, 129 Iowa 122, 105 N. W. 387, 3 L. R. A. (N. S.) 455, 113 Am. St. Rep. 452; *State* v. *Morgan*, 136 N. C. 628, 48 S. E. 670.

These two definitions of "wilfully" would have done well enough for "knowingly."* "Wilfulness," however, "has been defined to mean something more than knowingly" (*Murdock* v. *United States*, 62 F. (2d) 926, 928 (C. C. A. 7), citing *Felton* v. *United States*, 96 U. S. at 703; *Spurr* v. *United States*, 174 U. S. 734). And the court which noted that such a definition had been twice given by this Court, and which applied that definition, was itself affirmed by this Court (*United States* v. *Murdock*).**

That "wilfully" by itself means something other—and more—than "knowingly" is thus settled by the *Murdock* case and many others. The statute at bar—like the statute involved in *St. Louis & S. F. R. Co.* v. *United States*, 169 Fed. 69 (C. C. A. 8, Van Devanter, Cir. J.)—*couples* the terms. Particularly in such a case (*St. Louis & S. F. R. Co.* v. *United States, supra*, at 71, quoted in *United States* v. *Illinois Central R. Co.*, 303 U. S. 239, 243):

> "'Wilfully' means something not expressed by 'knowingly,' else both would not be used conjunctively."

The court below does not defend the trial court's treatment of "wilfulness". Judge Patterson's sole point is that "the appellant took no exception to the definition [of wil-

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* *Yates* v. *Jones National Bank*, 206 U. S. 158, 180, says of "knowingly":

> "Where by law a responsibility is made to arise from the violation of a statute knowingly, proof of something more than negligence is required, that is that the violation must in effect be intentional."

** "'Wilfully' is a word of stronger meaning than either 'knowingly' or 'corruptly,' or than 'both' together" (*Williams* v. *People*, 26 Colo. 272, cited in *United States* v. *Murdock*, 290 U. S. 389, 394).

"'The word "wilfully,"' says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes, means not merely "voluntarily," but with a bad purpose'" (*Felton* v. *United States*, 96 U. S. 699, 702; citing *Com.* v. *Kneeland*, 20 Pick. 220).

Wilfulness requires more than that conduct be "intentional and without legal justification" (*United States* v. *Murdock*, 290 U. S. at 397).

fulness] and did not ask that a more particular exposition be given" (R. 403). But in the *Murdock* case too there was no exception to that part of the trial judge's charge which disclosed his belief that wilfulness and knowledge were synonyms (Murdock, R. 48 *et seq.*). The absence of exception did not save the verdict in the *Murdock* case and should not in the case at bar. For in the *Murdock* case there was, and in the case at bar there is, another ruling predicated upon the same erroneous view of the wilfulness issue; and in each case exception was taken to that other ruling:

In the circumstances of the *Murdock* case there was error in the court's expressing to the jury his personal opinion that the prosecution's case had been proved,* and there was exception predicated upon that error.

In the case at bar there was the inclusive error of denying defendant's motion to dismiss at the close of the case "on the ground that there was no criminal intent," "that the Government has failed to prove that the defendant wilfully and knowingly used the passport to gain and secure entry into the United States," that "the Government has failed to prove that the defendant had a criminal intent at the time that he presented the passport to the immigration inspector in 1937 and 1938" (R. 227-8; exception 236; Eighteenth assignment of error, R. 386).

" 'Wilful' wrong is of the essence of the accusation" (*Potter* v. *United States,* 155 U. S. 438, 448), "the gravamen of the offense" (*Evans* v. *United States,* 153 U. S. 584, 594, quoted in *Potter* v. *United States,* 155 U. S. at 446, and *Spurr* v. *United States,* 174 U. S. 728, at 735). Where the

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* That "such an expression of opinion" does not

> "warrant a reversal where upon the undisputed and admitted facts the defendant's voluntary conduct amounted to the commission of the crime defined by the statute"

was recognized in the Murdock opinion (290 U. S. at 394, citing *Horning* v. *District of Columbia,* 254 U. S. 135).

statute calls for wilfulness, and there is no evidence of wilfulness, the case must, upon motion of the defendant, be dismissed at the close of the evidence, or verdict for the defendant directed (*St. Louis & S. F. R. Co.* v. *United States*, 169 Fed. 69 [C. C. A. 8], Van Devanter, Cir. J., Sanborn, Cir. J., concurring; to the same effect *United States* v. *Lehigh Valley R. Co.*, 204 Fed. 705, 707 [C. C. A. 3]).*

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* Other rulings, to which exceptions were taken, raised the wilfulness issue:

(1) Defendant requested the court to charge

"If you should find that the sentence in the application for a passport, executed by the defendant on or about August 31, 1934, which reads as follows:

'My last passport was obtained from

..... on .....

(INSERT WASHINGTON OR LOCATION OF OFFICE ABROAD) (DATE)

and is submitted herewith for cancellation.

.....

(GIVE DISPOSITION OF PASSPORT IF IT CANNOT BE LOCATED)'

was interpreted by the defendant to mean that he did not have any passport in his possession to be submitted for cancellation, and that *it was not his intention to conceal from the Government the fact that he previously had obtained another passport*, then it is your duty to find the defendant not guilty" (26th request to charge, R. 284; refusal and exception included in Thirty-first assignment, R. 300, 390).

(2) Defendant requested the court to charge

"If you find that the presentation of the passport on those two occasions was only for the purpose of identifying himself as a citizen of the United States, and not for the purpose of gaining a privilege as is intended by the inherent nature of a passport when used in foreign countries, then you must acquit the defendant. In determining the inherent nature of a passport, you must bear in mind that a passport has no sanctioned use, in law or custom, insofar as an American citizen is concerned, within the Port of New York" (33d request to charge, R. 286; refusal and exception included in Thirty-first assignment, R. 300, 392).

The 35th and 36th requests are along somewhat the same line (R. 286-7); the refusals and exceptions are included in the Thirty-first assignment (R. 300, 392):

The court was asked—but refused to charge—that an immigration inspector "has no power to exclude an American citizen for any reason whatsoever." "He must, as a matter of law, permit him to enter the country, when satisfied that he is an American citizen."

Conclusion.

The statute to be construed involves "foreign relations and intercourse." The ruling as to "use" is without precedent. The ruling as to "wilfulness' defies precedent. This Court should review, we submit, the judgment that rests upon these rulings in combination.

The Court in the exercise of its supervisory powers should grant a writ of certiorari to review and reverse the decision of the Circuit Court of Appeals for the Second Circuit.

WALTER H. POLLAK,
Attorney for Petitioner.

WALTER H. POLLAK,
CAROL KING,
BENJAMIN GOLDRING,
Of Counsel.

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